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No. 95-890

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES EX REL. WALID A. HINDO,

Petitioner,

vs.

UNIVERSITY OF HEALTH SCIENCES: THE CHICAGO MEDICAL SCHOOL AND FINCH UNIVERSITY OF HEALTH SCIENCES: THE CHICAGO MEDICAL SCHOOL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT OPINION IN THIS CASE CONFLICTS WITH OTHER CIRCUIT COURT OPINIONS AND DECISIONS OF THE SUPREME COURT.

Respondent asserts there is no conflict with the decisions of this Court or other circuits on the questions presented. (*See* Respondent's Brief, p. 5) This is simply not the case. The Seventh Circuit opinion in this case directly conflicts with the decision in *Young-Montenay v. United States*, 15 F.3d 1040 (Fed. Cir. 1994). The *Young Montenay* case is remarkably similar to the case before this Court. Both cases deal with contractors submitting inflated claims to the government. In both cases the contractor is submitting claims to the Veterans Administration.

In *Young-Montenay* the contractor entered into a contract to perform certain renovations to VA boiler equipment. Pursuant to this contract, Young-Montenay agreed to purchase a burner package for the renovation at a price of $104,000. Subsequently, a dispute arose as to whether the burner package would be a complete package and whether Young-Montenay would eventually owe $153,000 for a complete burner package for the renovation. The contractor submitted the inflated amount ($153,000) to obtain a progress payment. The court held Young-Montenay liable under the false claims act for front-loading and inflating amounts due. The court stated *it was immaterial that Young-Montenay would subsequently owe $153,000 for a complete burner package, for at the time of submission of the invoice to the VA Young Montenay knew they owed only $104,000 for the burner package.*

In this case it is stipulated that the respondents, at the time they submitted the invoices, knew there was no funding from

VACO for the radiology residents at issue in this case and submitted invoices for the radiology residents notwithstanding this knowledge. The University did not even have a contract for these two radiology residents. In *Young-Montenay* at least they had a valid contract with the VA for the burner package at $104,000. The Seventh Circuit places great weight on the fact that the University had a reasonable expectation of receiving funding in the future. However, under the *Young-Montenay* case UHS\CMS had to bill the VAMCNC based upon information known to them at the time they submitted the invoice. At all relevant times it was stipulated that the University knew there was no funding for these positions and therefore no amounts properly due for their services.

In short, the University should have waited until they knew they had funding for the positions before they billed the VA. By billing the VA for inflated amounts for the services of the radiology residents the respondents violated the False Claims Act. This Court must send a clear message to government contractors that they must bill the government based upon information known to them at the time they bill and that if they issue inflated claims to the government they may be liable under the False Claims Act for civil penalties. In this case under *Young-Montenay*, it is irrelevant that the University may have received funding at a later date and in this case the funding never occurred and respondent repaid amounts it already wrongfully billed and collected. In conclusion, on this point, there definitely seems to be a split of authority on the treatment of the knowing submission of inflated invoices under the False Claims Act.

Additionally, respondent's brief states *Abbott Labs v. Portland Retail Druggist Ass'n*, 425 U.S. 1 (1976), is a *Robinson-Patman* case but in the case the Court stated that courts have always construed the False Claims Act broadly because it is a remedial statute. (*See* 425 U.S. at 12). Perhaps Justice Black stated this proposition more eloquently when he wrote:

> The [False Claims] statute is a remedial one. It is intended to protect the treasury against the hungry unscrupulous host that encompasses it on every side, and should be construed accordingly.

(*United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943) quoting *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885). This liberal construction of the False Claims Act has also been established in other Supreme Court cases as well. (*See Rainwater v. United States*, 356 U.S. 590, 592 (1958), and *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). Since the Seventh Circuit opinion narrowly interprets the provisions of the False Claims Act, it conflicts with construction of the Act as applied in all of the above-cited Supreme Court cases and therefore should be reviewed by this Court.

Similarly, *Heckler v. Community Health Services*, 467 U.S. 51, at 63 (1984) was cited because the Supreme Court said, "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law. . . . Those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law." In this case the University was seeking public funds and must be held to this standard. Gary Almy was the chief of staff at the VAMCNC, he was also being paid by the University as associate dean for Veterans Affairs. Congress enacted a Rule, 18 U.S.C. § 209 which prohibits public employees from receiving additional compensation from private sources. Almy certified the invoices for payment knowing the radiology residents did not receive funding. Almy abetted UHS\CMS in submitting and certifying the invoices for payment. The University can not therefore rely on the knowledge of the VAMCNC and their acts to escape liability.

II.

FALSE CLAIMS LIABILITY SHOULD HAVE BEEN IMPOSED IN THIS CASE.

Perhaps, the most burning issue is the standard under amended 31 U.S.C. § 3729 (b) after the False Claims Amendment Act of 1986. In their analysis the Seventh Circuit first cites *United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F. 2d 1416, 1420 (9th Cir. 1991), for the proposition that innocent mistakes or negligence are not actionable under this section. (*United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608 (1995), Petitioner's Appendix A, p.9(a)).

In the case at bar however, their is no innocent mistake or just negligence. The fourth quarter bills were submitted to the Veterans Administration Medical Center North Chicago in November, 1990 after the VAMCNC had told the University in July 1990 that there would be no payment for radiology residents salaries for the academic year 1989-1990 that ends on June 30, 1990 because VACO did not approve funds for the salaries of the radiology residents to be reimbursed to the University. This is clearly communicated to John Gantz the Vice President of Finance at the University, who supervises the controller at the University. There was also a bill of collection issued on July 9,1990 and Gantz agreed to an offset in the fourth quarter bills of the amounts wrongfully paid to the radiology residents in November of 1990 when the fourth quarter bills were to be paid by the VAMCNC.

In July 1990 the evidence shows the University had been told flatly there would be no funding for these positions, that the University had agreed to repay the amounts already paid and they agreed to offset this amount against the salary reimbursement for

the positions that did receive funding from VACO. The University at the very least was submitting claims for payment when it had actual knowledge of the falsity of the information and knew it to be false which definitely meets the standard outlined in 31 U.S.C. § 3729(b). It can also be said that with respect to all the invoices, the University is acting in deliberate ignorance of the truth or falsity of the information contained in the invoices or that the submission of the invoices were acts of reckless disregard for the truth or falsity of the information contained in the invoices with respect to the radiology residents. This was not scientific error, this was a lie. The first three quarter billings of radiology residents were also not scientific errors, since the University knew they did not have funding authorization at the time they submitted the invoices. Accordingly, these are also lies and false claims liability should have been imposed in this case.

The Seventh Circuit opinion mentions that Dr. Rhodes, an Associate Dean at UHS\CMS, relied on Victor Wahby, who was an educational specialist from VAMCNC and transferred to Washington VACO in early 1989, who allegedly stated that UHS/CMS should hire the radiology residents because funding would become available. However, on Dr. Wahby's direct examination he said he never told anyone to contract for the positions and as a general rule whenever North Chicago came forth with questions concerning their allocation he would take himself out of the picture. (Transcript, p. 331). Even if Dr. Rhodes was entirely correct concerning what Wahby said about future funding, which appears from Waby's testimony to be erroneous, UHS\CMS can not rely on the possibility of funding in the future to currently bill the VA for the radiology resident position under the *Young-Montenay* analysis.

Page 6 of the respondent's brief in opposition sets forth the standard under § 3729(b) of the False Claims Act but conveniently leaves out the last line in the statute that says, "and

no proof of specific intent to defraud is required." This is important because the Seventh Circuit opinion seems to indicate on page 11(a) of the Appendix that some form of deceit, skullduggery or fraudulent motive is required by the University before false claims liability may be imposed. This Court needs to address this possible interpretation of the Seventh Circuit opinion.

Respondent's Brief on page 9 states that the University was not told that until July 1990, when the VAMCNC asked for a refund that the VANCMC had not in fact obtained such funding. First, the trial record is clear that no one at the VAMCNC or VACO ever told the University that they received funding for the radiology resident positions at issue in this case. Second, there was a plethora of documentation that was part of the stipulation of facts in this case (Appendix J, numbers 7-14) where the University was notified through the Deans Committee and their Associate Dean for Graduate Medical Education, Dr. Mitchell Rhodes, who attended the Deans Committee meetings that discussed the final allocation for the academic year 1989-90 for residence positions approved for funding was 53.5 residency positions. This allocation did not include funding for the two radiology residents. On November 3,1988, the VAMCNC was notified that the appeal made for the two positions was received too late and they would be placed on a waiting list. All of these communications unambiguously stated the VAMCNC had not obtained funding for the positions and the University was informed of these facts. All of these stipulated facts show affirmatively that the University knew they lacked funding at the time they submitted the invoices for payment from the VA. Yet, the University's brief states that Petitioner overstates the stipulations at trial. This assertion is erroneous.

In the case at bar it is stipulated that several corporate officers of UHS\CMS including but not limited to the Dean of the

Medical School, Marshall Fall, Associate Dean for Veterans Affairs, Gary Almy, and Associate Dean for Graduate Medical Education Mitchell Rhodes all knew of the lack of funding for the radiology residents at issue in this case. (Transcript, pp. 78-79, 126, 128, 132, 133, 135, 136, 198, 217) These agents of UHS/ CMS attended Deans Committee Meetings and House Staff Affairs Committee wherein the lack of funding for the radiology residents was discussed. (Trial Exhibits, 15-17). All of the evidence and testimony in this case showed affirmatively the University knew they did not have funding for these positions prior to July 1990 and they had this knowledge at the time they submitted the invoices.

The respondent attempts to argue that the VA received a big windfall from the University. This assertion ignores the fact that the University is already receiving over 1.6 million dollars annually from the VA to reimburse the University for the salaries of medical residents that rotate through the VAMCNC. (*See* Appendix K, Trial Exhibit 162, fourth quarter invoices from the University to the VA where over $400,000 in residency salaries are paid by the VA to UHS\CMS). In this case 1.6 million was not enough support for the University's residency programs though, they needed to bill $55,933.81 more for radiology residents. (*See* Plaintiff's fourth amended complaint, paragraph 7) of which $45,801.88 was paid and collected by the University. In July 1990 they agreed to offset the $45,801.88 wrongfully paid, however even after the agreement, the University billed the VA $10,131.93 additionally for radiology residents in the fourth quarter that was never paid by the VA. If there is any irony here it is that the University now claims that the VA obtained a windfall. If anyone obtained a windfall from this relationship it was the University to the extent of 1.6 million dollars. It is also ironic that false claim defendants frequently give the government something for nothing when they are caught with their hand wrongfully in the till of the United States treasury. Secondly, the

University, by operating the residency programs, kept their accreditation with the American Medical Association, which without such accreditation, the medical school could have problems recruiting students.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER LEAVE TO FILE HIS SECOND AMENDED COMPLAINT, WHICH CONTAINED ADDITIONAL RETALIATORY ACTS UNDER 31 U.S.C § 3730(h) WHICH SHOULD NOT HAVE BEEN BARRED BY *RES JUDICATA*.

Additionally, respondent's brief indicates the trial court properly denied Hindo leave to file his second amended complaint. The trial court actually abused its discretion in failing to allow petitioner leave to file its second amended complaint with additional retaliatory acts alleged. The complaint was filed within the six year statute of limitations. It properly related back to the original filing of the complaint since Judge Grady had previously given petitioner leave to file a Count III, alleging retaliatory acts by respondents. There were also reasons conveyed as to why the amendment was not filed sooner. The reason was that counsel found out about the additional retaliatory acts after respondents filed their motion to dismiss, when he sat down to discuss the issues contained in the motion to dismiss with his client. At this point the relator had already been through three days of deposition testimony in which many of the retaliatory acts alleged were discussed. The motion was filed before the end of discovery. The case was not tried until over a year after the motion came before the court. Since the case took so long to go to trial the respondents were not prejudiced by the amendment. Further, petitioner requested leave the same date to extend discovery. It was also denied, even though trial took place over a

year later. It was a case of hurry up, prepare a case for trial, then wait over a year.

Further, if you view the case from a relator's viewpoint, he does not have the expertise to know what is an illegal act under the retaliation provisions of the False Claims Act, especially in a case such as this, where he has already lost in state court which may justify these retaliatory acts in his mind. There was no reason not to permit the amendment under these facts.

Lastly, the respondents allege that this is not a *res judicata* case. This is another misconception the respondents have. The record will show there were allegations in the first amended complaint alleging harassment that were not contained in the Lake County case that Judge Grady clearly stated were barred by *res judicata*. (*See* Appendix H). The petitioner alleges these allegations of harassment were new and separate causes of action not barred by *res judicata*.

CONCLUSION

To protect the treasury against contractors that knowingly submit inflated claims to United States governmental entities, the petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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